IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 12 OF 2005

Andrew S/o Francis Parado,
r/o. H. No. 2, Ward (19),
Near Last Bus Stop,
New Vaddem, Vasco. ..... Appellant

V e r s u s

S T A T E
(Officer I/C Vasco Police
Station), through Public Prosecutor ..... Respondent

Shri T. Pereira, Advocate with Shri L. S. Salkar, Advocate for the Appellant.

Shri S. N. Sardessai, Public Prosecutor for the State.

CORAM : N. A. BRITTO, J.

DATE : 18th March, 2006.

ORAL JUDGMENT

This revision is filed by A2/Andrew Francis Parado, against his conviction and sentence under Section 326 read with Section 34 I.P.C., by the learned J.M.F.C., Vasco da Gama, which conviction and sentence has been upheld by the learned Sessions Judge, Margao, by his Judgment/Order

dated 22.06.2005.

2. The applicant/A2, is the owner of Rosy Bar, situated at New Vaddem, at Vasco da Gama. The accused no.1/Sainath Naik, P.w.1/Mohamed Yusuf and P.w.9/Azmat Khan, were his customers. The incident took place on 10.11.1999, at about 1.00 p.m. and the complaint regarding which was lodged by P.w.1/Mohamed Yusuf on the same day. Incidentally, it was lodged against A1/Sainath Naik only. The scene of offence panchanama was conducted on 12.11.1999 and A2/Andrew Francis Parado, was arrested only on 25.11.1999, just before the panchanama of recovery at his instance was allegedly made. Both the accused came to be prosecuted with the allegation that both of them in furtherance of common intention, on the said date, time and place, had voluntarily caused grievous hurt to P.w.9/Azmat Khan by means of corrosive substance by throwing it on the face of the said Azmat Khan, punishable under Section 326 read with Section 34 of the Indian Penal Code. The evidence produced by the prosecution, which showed the complicity of A2/Andrew Parado, was that of the injured himself namely P.w.9/Azmat Khan, the complainant P.w.1/Mohamed Yusuf and P.w.6/Pravin Kumar. As far as the evidence of the complainant Mohamed Yusuf is concerned, he stated that Azmat Khan

was his friend and that on 10.11.1999, at about 1.00 p.m., they had gone to the said Bar and the said Azmat Khan had ordered for a quarter of Real Whisky for himself and he had ordered half a quarter. He had stated that he had noticed A1/Sainath Naik, who was a regular customer in the said Bar and who was drinking near the counter and that after half an hour, A1/Sainath Naik had come near them and had demanded for a cigarette from Azmat Khan and Azmat Khan had told him that he was not having a cigarrete and again after sometime, A1/Sainath Naik had demanded for another cigarette, which was given and, thereafter, A1/Sainath Naik had asked the bar owner, namely A2/Andrew Parado, to give him half quarter of DSP liquor and A2/Andrew Parado had told him that he did not have DSP but A1/Sainath Naik had insisted on having DSP liquor and, at that time, A2/Andrew Parado, brought one steel glass containing some liquid and, thereafter, A1/Sainath Naik brought the glass near P.w.9/Azmat Khan and told him to smell the same and while Azmat Khan was smelling the liquid in the said glass, A1/Sainath Naik splashed the liquid on the face of Azmat Khan, due to which, the said Azmat Khan sustained injuries on his eyes and face and started shouting whereupon, A1/Sainath Naik, threw the glass on the floor and ran away from the spot and, thereafter, the brother of A2 took Azmat Khan to a hospital at Vaddem, on the scooter of A2/Andrew Parado

and he went to inform the sister of Azmat Khan at New Vaddem and, thereafter, lodged his complaint to the police. In cross examination, the complainant Mohamed Yusuf, admitted that he had lodged the complaint only against A1/Sainath Naik. He had also stated that he had not read the said complaint. He had also admitted that in the said bar, no liquor was served in steel glasses and also no steel glasses were used to serve water. He also admitted that he had not implicated A2/Andrew Parado in the complaint but gave no explanation as to why he had not implicated him, in case he was involved. All that the complainant Mohamed Yusuf had stated in his complaint was that Sainath (A1) had asked the bar owner (A2) to give him half quarter of DSP company liquor and immediately, went inside the counter and brought one steel glass containing some liquid and brought the same near Azmat Khan and told him to smell the same and while he was smelling the said liquor, Sainath (A1) splashed the said liquid on his face, due to which, Azmat sustained injuries on his face. Needless to observe, that the version of P.w.1, that A2/Andrew Parado had brought one steel glass containing some liquid, was a clear improvement in the version of P.w.1/Mohamed Yusuf, who had not at all implicated A2/Andrew Parado in the alleged incident of A1/Sainath Naik, bringing the steel glass near P.w.9/Azmat Khan and then telling him to smell the same and splashing it

on his face. This aspect of the case, as regards the complicity of A2, has escaped the attention of both the Courts below. In case A2/Andrew Parado was at all involved in the said incident of splashing the said liquid on the face of P.w.9/Azmat Khan, then P.w.1/Mohamed Yusuf would have certainly implicated A2/Andrew Parado in the complaint filed by him, which came to be filed against A1/Sainath Naik only. P.w.12/PSI Karpe has admitted that no supplementary statement of Complainant was recorded implicating A2/Andrew Parado.

3. P.w.9/Azmat Khan, after narrating the incident of A1/Sainath Naik, asking for cigarette, stated that A1/Sainath Naik went inside behind the bar counter, at which time, A1/Sainath Naik told A2/Andrew Parado to give him a drink, and at that time, A2/Andrew Parado removed a bottle from the lower part and poured into a steel glass the contents of the bottle and then A1/Sainath Naik brought the glass to him and told him to smell the same and, at that time, he saw A2/Andrew Parado making some action to A1/Sainath Naik and A1/Sainath Naik throwing the contents of the glass on his face and the liquid from the said glass going to his mouth and eyes. However, in cross examination, he was confronted with his previous statement, wherein he had not stated that A2/Andrew Parado had removed

the bottle from under the counter and poured the liquid into the steel glass. He was also confronted with his previous statement, wherein he had not stated, that he had seen A2/Andrew Parado, making some signals by action to A1/Sainath Naik. These omissions were proved through the evidence of P.w.12/PSI Karpe. These were, but material omissions in the version of P.w.9/Azmat Khan, as far as the complicity of A2/Andrew Parado is concerned. In other words, A2/Andrew Parado came to be implicated by P.w.9/Azmat Khan for the first time before the Court and, in such a situation, the evidence of P.w.9/Azmat Khan as far as complicity of A2/Andrew Parado is concerned, was required to be rejected.

4. The recovery of a bottle at the instance of A2/Andrew Parado, which is stated to have contained corrosive substance, is not free from doubt. I have already stated that the incident took place on 10.11.1999 and there is no dispute that A2/Andrew Parado, was running his bar as usual till he was arrested just prior to the recovery of panchanama on 25.11.1999. The scene of offence panchanama was conducted on 12.11.1999 but the bottle/MO2, was not in the picture on that day. The evidence of P.w.6/Pravin Kumar shows that although the accused had stated that he would show the bottles which were kept under the counter, as a bar man,

the accused might have had umpteen bottles in his said bar. P.w.6/Pravin Kumar further stated that after going to the bar, the accused removed one plastic bottle, which was sealed by the police and his signature was obtained but he was unable to find his signature when the bottle MO2 was shown to him in Court. However, in cross examination, he admitted that he and P.w.5 (the other panch witness), were standing near the front room of the bar and it is A2/Andrew Parado and the Constable, who had gone inside and brought the bottle/s and handed over to the PSI, who had taken the same. He stated that the bottle was not opened nor they took smell of the same. In other words, P.w.6/Pravin Kumar, did not see A2/Andrew Parado, removing and handing over any bottle/s to the PSI.

5. Both the Courts below have totally ignored the fact that P.w.1/Mohamed Yusuf had not implicated A2/Andrew Parado in his complaint filed soon after the incident. Both the Courts below have also not taken into consideration the improvements made by P.w.9/Azmat Khan from the earlier version given by him, as far as the involvement of A2/Andrew Parado is concerned. In a situation like this, both the Courts below ought to have concluded that the prosecution had improved its case as far as the complicity of A2/Andrew Parado is concerned and given him

benefit of doubt. The conviction of A2/Andrew Parado is grossly erroneous and has caused failure of justice. Consequently, this revision deserves to succeed. The conviction and sentence imposed by the learned J.M.F.C. upon A2/Andrew Parado, by Orders dated 30.06.2004/09.07.2004 and confirmed by the learned Sessions Judge by his Judgment/Order dated 22.06.2005, is hereby set aside and consequently, A2/Andrew Parado, shall stand acquitted under Section 326 read with Section 34 of the Indian Penal Code.

6. Revision is allowed on the above terms. No order as to costs.

N. A. BRITTO, J.

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